Supreme Court, U.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM, 197____

NO. 74-673

CLARENCE JONES,

PETITIONER

VS

UNITED STATES OF AMERICA,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Jacob G. Hornberger
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Laredo, Texas 78040

Attorney for Petitioner

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IN THE

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_____TERM, 197____

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NO. _____

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CLARENCE JONES,

PETITIONER

VS

UNITED STATES OF AMERICA,

_____

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF

APPEALS FOR THE FIFTH CIRCUIT

_____

The petitioner, Clarence Jones, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on October 2, 1974, and to the order of that Court dated October 30, 1974, denying the petitioner's Petition for Rehearing.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, which appears at Appendix A, pages 1 thru 3, and the order of that Court denying the Petition for Rehearing, which appears at Appendix B, page 4, have not been reported as of this date.

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit (App. A, pp. 1 thru 3), was

entered on October 2, 1974. A timely Petition for Rehearing was denied on October 30, 1974. The jurisdiction of this Court is invoked under 28 USC Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. The evidence presented in this case is not sufficient to sustain a finding and judgment of conviction of either conspiracy, possession with intent to distribute or unlawfully importing, or any of them, of a quantity of cocaine.

2. The Statement of the United States Attorney to the Court after the Court had found the defendant guilty on three counts to the effect that:

> "Your Honor, with all respect to Mr. Hornberger and his client, Mr. Jones, I feel that the life of Miss Santiago, however poor it has been and perhaps misguided, would be in danger."

And the Court's response thereto:

"I think he would have more sense than that. I am going to put him in custody until such time as I impose sentence. He would have to stay here some time anyway for the pre-sentence to be prepared. I will take a look at the bond on appeal."

constituted prejudicial error and a mistrial should have been granted on the Court's own motion.

3. The Court erred in denying this Petitioner's Motion to be allowed to inspect the pre-sentence investigative report.

FEDERAL RULE INVOLVED

See Appendix C, pages 5 thru 6.

STATEMENT OF THE CASE

This petitioner, Clarence Jones, along with one Raoul Perez and one Rafael Aleman, was indicted in a four-count indictment filed on December 17, 1973. In Count One he was charged

with a conspiracy to import into the United States a quantity (12 ounces) of cocaine; in Count Two he was charged with possessing with intent to distribute a quantity of cocaine; in Count Three he was charged with importing into the United States from Mexico a controlled substance; and in Count Four with distributing a controlled substance. A trial before the Court, without a jury, was held on March 20, 1974, and the Petitioner was found guilty on Counts One, Two and Three, and not guilty on Count Four. The defendant, Aleman, was and still is a fugitive, and was not tried. The defendant, Raoul Perez, was granted immunity for his testimony against the defendant, Jones, and the indictment against him was dismissed on April 24, 1974. On April 23, 1974, this Petitioner filed his Motion for an order permitting him to inspect the investigative report made at the direction of the Court by the Probation

Officer. On April 29, 1974, this latter motion was denied and the Petitioner was sentenced on Count One to a term of ten (10) years to be served with a special parole term of five (5) years, and a $5,000.00 fine to be paid. On both Counts Two and Three, he was given ten (10) years with a special parole term of five (5) years, but both sentences were to be served concurrently with the sentence on Count One. On April 30, 1974, the petitioner gave notice of appeal.

The defendant, Perez, with his girlfriend, Jennie Santiago, a co-conspirator not indicted, was arrested at the airport in San Antonio with the cocaine in question when he was attempting to board a plane. An agreement was made with the Customs Agents under the terms of which Perez was to continue on to New York and make delivery of the package. The package was delivered to the Petitioner, Jones, in New York

and he was arrested immediately after delivery. The Petitioner, Jones, took the stand and denied that he knew that there was cocaine in the package, but,on the contrary, thought it was money which he claimed had been taken from him bv the defendant Perez. The only witnesses appearing against the Petitioner were the agents who arrested Perez in San Antonio, the agents who arrested the Petitioner in New York, Perez himself, and his woman companion, Jennie Santiago. Perez is an exconvict and admittedly a dealer in narcotics. The three, that is, Perez, his girlfriend and Jones, prior to their arrest, had been on a trip to Mexico for approximately three or four days. Entry back to the United States was made at Laredo, Texas. The Petitioner testified that he had lost contact with his companions in Laredo, that he felt they had stolen his money and personal belongings and that he returned to New York alone.

REASONS FOR GRANTING THE WRIT

Question No. 1 (Restated)

The evidence presented in this case is not sufficient to sustain a finding and judgment of conviction of either conspiracy, possession with intent to distribute or unlawfully importing, or any of them, of a quantity of cocaine.

In United States vs Steinhilber, 484 F2 386 (1973), 8th Circuit, in referring to "sufficiency of evidence" issue, the Court stated:

"As Steinhilber properly concedes, our standard of review with regard to challenges to the sufficiency of the evidence must be that which views the evidence in the light most favorable to the Government, with all the inferences which may be properly drawn therefrom. See, e.g., Glasser v United States, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 860 (1942). But as we have often said:

'It is true that the government is entitled to the benefit of all reasonable inferences to be drawn from the evidence. However, where the government's evidence is equally strong to infer innocence of the crime charged as it is to infer guilt, the verdict must be one of not guilty and the court has a duty to direct an acquittal...' United States v Kelton, 446 F2d 669, 671 (8th Cir. 1971). Accord, United States v Williams, 470 F2d 1339, 1343 (8th Cir. 1973)."

In United States v Cipulo, 170 F2d 311, (1948), 2nd Circuit, the Court quoted with approval the following charge given by the District Court:

"What about the testimony of an accomplice? The testimony of an accomplice in connecting others with a crime charged should be viewed by the jury with

a certain degree of caution and weighed carefully. It is to be preferred that there be some corroboration of a substantial part of the accomplice's testimony. The extent to which there has been such corroboration, if any, is for the jury to determine. However, corroboration is not absolutely necessary, and a defendant may, under our jury system, be convicted on the uncorroborated testimony of an accomplice if the jury believes the testimony of the accomplice and if it establishes in the minds of the jury the guilty of the defendant beyond a reasonable doubt."

In Babb v United States, 252 F2d 702, (1958), 5th Circuit, Opinion by Judge Rives, the Court stated:

The Court charged the jury that one of the Government witnesses, Trevino, was an accomplice witness, and that the evidence raised an issue as to whether four other named Government witnesses were accomplice witnesses. The court further charged:

'You are hereby instructed that if you believe the said witnesses, * * or either of them, are accomplice witnesses, as that term is defined for you in the Court's charge, or have a reasonable doubt thereof, then you shall take and consider the testimony of such witness or witnesses as you may believe to be accomplices, or have a reasonable doubt thereof, with caution. It is not necessary that their testimony be corroborated, but I charge you that their testimony is to be received with caution by you and you should not accept it unless, in your opinion, it so harmonizes with the other

evidence in the case as to leave in your mind no reasonable doubt of its truth.

'I hereby instruct you, that as to the witness Trevino, as I have heretofore stated, he is an accomplice witness and you shall consider the testimony of the said Trevino with caution.'

Defendant objected to the charge because it did not include the following:

'That said testimony, if said witnesses are found to be accomplice witnesses, should be considered with suspicion and great care and caution.'

It is too clear for argument that the charge on accomplice testimony as given was sufficient."

In Caminetti v United States, 242 U.S. 470, 37 S.C. 192, 61 L.Ed. 442, this Honorable Court stated:

"It is urged as a further ground of rever-

sal of the judgments below that the trial court did not instruct the jury that the testimony of the two girls was that of accomplices, and to be received with great caution and believed only when corroborated by other testimony adduced in the case. We agree with the circuit court of appeals that the requests in the form made should not have been given. In Holmgren v United States, 217 U.S. 509, 54 L. Ed. 861, 30 Sup. Ct. Rep. 588, 19 Ann. Cas. 778, this Court refused to reverse a judgment for failure to give an instruction of this general character, while saying that it was the better practice for courts to caution juris against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to such evidence. While this is so, there

is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them."

See also Gormley v U.S., 167 F2d 454 (1948) 4th Circuit.

In Osborne v United States, 351 F2d 111 (1965) 8th Circuit, the Court stated:

"The strength of the Government's case depends very largely upon the credibility of the witnesses Leu, Dorrell and Crouch. All were admitted accomplices. Federal courts have consistently held that a conviction can rest upon the uncorroborated testimony of an accomplice if it is not otherwise incredible or unsubstantial on its face. Williams v United States, 8 Cir., 328 F2d 256, 259. It is also well established that it is 'the better practice for courts to caution juries against too much reliance upon the testimony of accomplices and to require corroborating testi-

mony before giving credence to such evidence.' Caminetti v United States, 242 U.S. 470, 495, 37 S. Ct. 192, 198, 61 L. Ed. 442 * * *.' Bass v United States, 8 Cir., 324 F2d 168, 172."

In United States v Callis, 390 F2d 606 (1968) 6th Circuit, the Court stated:

"Appellant refers to the law of Tennessee, where, it is contended, the rule prevails that uncorroborated testimony of an accomplice is insufficient to support a conviction. This, however, is a federal case and the rule is different. In federal cases the uncorroborated testimony of an accomplice is sufficient to support a conviction. While the court did not charge that the witnesses in question were accomplices because it was not clear to ir that they were, it nevertheless instructed the jury that an accomplice is one who unites with another person in the commission of a crime voluntarily and with common intent; that an

accomplice is not incompetent as a witness because of participation in the crime charged, but that his testimony, if believed by the jury, might be of sufficient weight to sustain a verdict of guilty even though not corroborated or supported by other evidence. The court, however, went on to charge that the jury should keep in mind that the testimony of an accomplice is to be received with caution and weighed with great care, and that they should not convict a defendant upon the unsupported testimony of an accomplice unless they believe such testimony to be true beyond a reasonable doubt. This cautionary instruction is in keeping with the better practice."

The practice of exerting pressure on witnesses to disclose confederates is becoming more and more prevalent in this country, or at the very least, the practice is being given more publicity. Admittedly, the exercise of such practice is helpful in law enforcement procedures.

But as Judge Learned Hand once stated, "A man faced with perpetual imprisonment til he discloses his confederates, will in the end find confederates to disclose." It is suggested that the practice, unfettered by any guidelines or safeguards whatever, has a high inherent potential for the encouragement of perjury, the conviction of the innocent, and the release of the guilty. As one newspaper editorialized, "With governmental encouragement we are becoming a nation of finks." It is understandably excusable to grant immunity to one defendant if his testimony would disclose offenses by a number of other defendants or would help in destroying a so-called gang or ring. However, in the case at hand, we have immunity being promised to a defendant whose guilt was certain, in an effort to convict another defendant whose guilt is far from certain. Under the testimony of the co-conspirators, all were equally guilty, so what advantages to society or to law

enforcement or to justice are to be gained from such government-defendant deals? Some corroboration should be required, and it is apparent from the decisions cited that the Courts are moving in this direction.

Conclusion Under Question No. 1:

A. The government's case is based entirely on the testimony of two accomplices.

B. There is absolutely no corroboration of the testimony of the two accomplices.

C. The fact that the goverament offered immunity to two of the co-conspirators created only a swearing match in this court proceeding, and there is absolutely no basis for a conclusion that the testimony of the so-called accomplices was more credible than that of this defendant-Petitioner.

D. The record makes it appear almost certain that the conviction was had solely because

this black man from New York was carrying what in this part of the country is a rather large sum of money for a black man to be carrying. No reasonable inferences can or should be drawn from the fact that a person prefers to carry cash rather than some negotiable type of instrument.

In view of these facts, it is respectfully submitted that there is not sufficient evidence to sustain a conviction on any of the counts.

Question No. 2 (Restated)

The Statement of the United States Attorney to the Court after the Court had found the defendant guilty on three counts to the effect that:

> "Your Honor, with all respect to Mr. Hornberger and his client, Mr. Jones, I feel that the life of Miss Santiago, however poor it has been and perhaps misguided, would be in danger."

And the Court's response thereto:

"I think he would have more sense than that. I am going to put him in custody until such time as I impose sentence. He would have to stay here some time anyway for the pre-sentence to be prepared. I will take a look at the bond on appeal."

By his remarks after the Court had found the petitioner guilty on three counts, the United States Attorney accused this petitioner of being a man of violence and a potential murderer. There was absolutely nothing in the record of this proceeding to indicate that there was any truth whatsoever to such an accusation, and quite apparently, it was made with a view of prejudicing this petitioner in the eyes of the court. No other result could have been intended or reached, and it is respectfully contended that such an accusation, without cause, constituted fundamental and reversible error.

Question No. 3 (Restated):

The Court erred in denying this Petitioner's Motion to be allowed to inspect the pre-sentence investigative report.

Since this petitioner did have a previous criminal record, and since the pre-sentence report was for the most part prepared in the town of his residence, New York City, the petitioner felt it absolutely necessary that he be permitted to see the investigative report to correct any errors that might be contained therein. He is a man 68 years of age with a life expectancy of 11.7 years, and, necessarily, upon a finding of guilty was subject to a maximum sentence of 45 years. He had been accused by the United States Attorney of being a man of extreme violence and a potential murderer, and it was absolutely essential to determine whether such information was contained in the investigative

report. Without assigning any reasons therefor, the Court summarily denied the motion of the petitioner to inspect the investigative report, although the Court did go over with the petitioner at the time of sentencing the arrest record of the petitioner. Admittedly, the different circuits take different views as to under what circumstances the defendant should be allowed to inspect this report.

In U.S. v Solomon, 422 F2 1110, 7th Cir., 1970, it is stated:

"Under Rule 32e2, of the Federal Rules of Criminal Procedure, the discretionary power of the trial judge to determine the extent and nature of disclosure of the probation officer's pre-sentence report is not unfettered and should be liberally applied."

In Townsend v Burke, 334 U.S. 736, 92 L. Ed. 1691, Supreme Court, 1948, the Court stated:

"Consequently, on this record we conclude that while disadvantaged by lack of counsel, this prisoner was sentenced on the basis of assumptions concerning his criminal record which was materially untru. Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand."

In Scott v U.S., 419 F2 264, District of Columbia, 1968, the Court stated:

"The trial judge has wide freedom in information that may be considered in imposing sentence. However, the Court stated that,

> 'But the appellate court must scrutinize the sentencing processes to insure that the trial judge has considered the information available with some regard for its reliability and has evaluated the information in light of the factors relevant to sentencing.' See 92 Led 1690."

In United States v Dockery, 447 F2 1178, Court of Appeals, District of Columbia, 1971, the Court held:

> "It is not a violation of due process for the trial court in imposing sentence to rely on a pre-sentence report without affording defendant the opportunity to contradict or rebut statements contained in the report. It is important to note, however, that the trial court's decision not to disclose the pre-sentence report was not the result of conforming to a set pattern which would negate the exercise of individual discretion. In this case parts of the reports were actually discussed with the defendant."

In United States v Carden, 428 F2 1116, 8th Cir. 1970, it is stated:

> "If the defendant's record, as publicly disclosed at the hearing, is incorrectly reported,

the defendant should have opportunity to explain any discrepancy; if factual background is erroneous, the defendant should have opportunity to inform the court concerning the alleged misinformation."

In U. S. v Weiner, 418 F2 849, 5th Cir. 1969, the Court stated that, "Only when it is shown that the trial judge relied on information which was in fact not true is error committed during the sentencing procedure."

It is difficult to perceive how this can be shown unless the defendant is permitted access to the investigative report.

In U. S. v Fisher, 381 F2 509, 2nd Cir., 1967, the Court stated:

"The foregoing discussion, however, should not be construed to imply that the authority granted the sentencing judge in the amended Rule 32(c) to disclose material in the pre-sentence investigation report and to give the defendant or

his counsel an opportunity to comment on it should be exercised conservatively and in a niggardly fashion. On the contrary, the administration of justice would be improved by a liberal and generous use of the power to disclose."

The Petitioner respectfully refers this Honorable Court to the Article by Mr. Walter W. Steele, Jr., in Volume 56, page 37 of the January, 1970, issue of the American Bar Association Journal, in which article it is stated:

"The presentence report usually contains a sentencing recommendation from the probation officer. Empirical studies have shown that the judge follows the probation officer's recommendation in most cases. Naturally, individual probation officers vary in their willingness and ability to make recommendations objectively. Consequently, the presentence report may be more than unfavorable to a defendant; it may

actually be prejudicial to him, as demonstrated by the following statements taken from two presentence reports:

> While (the defendant) apparently never engaged in any serious criminal conduct before, and while he has never shown any tendency to use violence, it is rumored in the factory, and evidently widely believed, that about two years ago he murdered his boss's wife.
>
> * * *
>
> He is a nice looking, clean cut, all-American appearing young man. Beneath this, however, he is as cold as ice. He is an expert manipulator, playing one person against another, with an amazing ability to say just what he thinks you want to hear.

The presentence report may contain other forms of prejudicial information.

"After the presentence report is prepared, the lawyer should always file a motion under Rule 32 of the Federal Rules of Criminal Procedure requesting the court to make it available. The court may exercise its discretion to grant the motion; and even if the motion is denied, it serves to encourage the court to discuss the report from the bench at the time of the sentencing hearing. Many federal judges have already adopted the practice of disclosing all or parts of the report, either in advance of the hearing or from the bench at the time of the hearing. This provides the lawyer with some idea of what factors the court considers most applicable to the sentence."

Petitioner represents that the judge presiding in the District Court of the United States

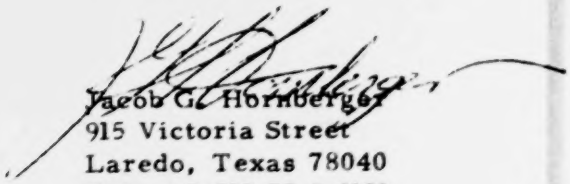
for the Southern District of Texas, Laredo Division, Chief Judge Ben C. Connally, has a hard and fast rule of never permitting the inspection of the pre-sentence reports. Petitioner states that this creates an intolerable condition and allows even greater disparity in the sentencing procedure. Particularly the Court should allow these pre-sentence reports to be inspected when the only testimony upon which the defendant is convicted is that of his co-conspirators, for then the likelihood that prejudice will be stacked upon prejudice both in the trial, as well as in the sentencing procedure, will be eliminated. It is respectfully represented that the Court should be made to state the basis for his refusal to allow an inspection under proper safeguards. If the defendant is so protected, the probation officers, who after all are only quite human, would be less inclined to base their reports on hearsay and personal opinion and even prejudice.

Conclusion Under Question No. 3:

Because of the conflict between the opinions of the various Courts of Appeals, and because the refusal by some District Judges to allow the inspection of pre-sentence reports under any circumstances is resulting in the imposition of unfair sentences, it is respectfully requested that this Petition be granted, and that this Honorable Court set guidelines to be followed by the trial courts when motions to inspect the pre-sentence investigative reports are filed by defendants.

WHEREFORE, Petitioner respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,



Jacob G. Hornberger
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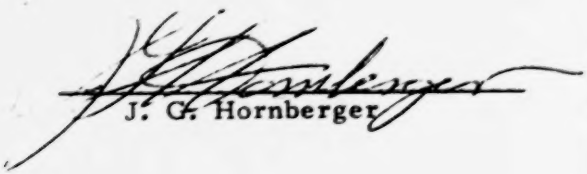
Laredo, Texas 78040
Tel. AC 512 72 2-1121

Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of November, 1974, a copy of Petitioner's Petition for a Writ of Certiorari was by me mailed to the United States Attorney for the Southern District of Texas, P.O. Box 61129, Houston, Texas, 77061, Attorney for Plaintiff-respondent.



J. G. Hornberger

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-2224
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CLARENCE JONES, Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas

(October 2, 1974)

Before BELL, SIMPSON and MORGAN,
Circuit Judges.

PER CURIAM:

Appellant was convicted after a non-jury trial of conspiracy, importation, and possession of with intent to distribute 12 ounces of cocaine. Title 21, U. S. C., Sections 952 (a)

* Rule 18, 5 Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al, 5 Cir. 1970, 431 F2d 409, Part I.

963, 841 (a), Title 18, U.S.C., Section 2 (a). He seeks reversal of his judgment of conviction and sentence alleging (1) that there was insufficient evidence to support conviction under any or either of the three charges, (2) that the prosecutor made prejudicial comments at trial, and (3) that he should have been allowed to inspect the pre-sentence report. These contentions lack merit. We affirm.

Viewed in the light most favorable to the government the evidence supports the conclusion of appellant's guilt beyond a reasonble doubt. United States v. Warner, 5 Cir. 1971, 441 F. 2d 821, cert. denied, 404 U. S. 829, 92 S. Ct. 65, 30 L. Ed 2d 58; Glasser v. United States, 1941, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680.

The prosecutor's remarks that are alleged to be prejudicial were made after

appellant was found guilty. No substantial rights of appellant were affected by them. Under the circumstances, any error was harmless. See United States v. Rhoden, 5 Cir. 1972, 453 F. 2d 598.

F. R. Crim. P. Rule 32 (a) (2) places disclosure of the pre-sentence report within the sound discretion of the trial judge. We have repeatedly upheld the rule. United States v. Frontero, 5 Cir. 1971, 452 F. 2d 406. No showing of an abuse of discretion has been made.

The evidence amply warrants the finding of guilt, and prejudicial error is not made to appear.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 74-2224

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CLARENCE JONES,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING

(October 30, 1974)

Before BELL, SIMPSON and MORGAN,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

Rule 32 of the Federal Rules of Criminal Procedure reads in part as follows:

"32 c (1): Presentence Investigation. When Made. The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

32 c (2): Report. The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances

affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court. The court before imposing sentence may disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation and afford an opportunity to the defendant or his counsel to comment thereon. Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the government."